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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76- 76-1249

J. EDWARD DAY, *Petitioner,*

v.

WILLIAM H. AVERY, ET AL., *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, J. Edward Day, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered in this proceeding on November 10, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A attached. The opinion of the United States District Court for the District of Columbia is reported at 394 F. Supp. 986 (D.D.C. 1975) and is attached as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered November 10, 1976. A

timely petition for rehearing was denied on December 8, 1976, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals was free to disregard the rule of the District of Columbia common law.

2. Whether the Court of Appeals, in affirming factual conclusions made by the United States District Court and in deciding other factual questions and inferences against the Petitioner, denied the Petitioner his Seventh Amendment right to have factual questions determined by a jury.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the Rules of the common law." *The Constitution of the United States,* Amendment 7, U.S.C.A. Const. Amend 6-12 696 (1972).

District of Columbia Code Annotated § 11-102

"§ 11-102 Status of District of Columbia Court of Appeals:

The highest court of the District of Columbia is the District of Columbia Court of Appeals. Final judgments and decrees of the District of Columbia Court

of Appeals are reviewable by the Supreme Court of the United States in accordance with section 1257 of title 28, United States Code. (July 29, 1970, Pub. L. 91-358, § 111, title I, 84 Stat. 475.)"

District of Columbia Code Annotated § 11-301

"§ 11-301. Jurisdiction of appeals from District of Columbia Court of Appeals:

In addition to its jurisdiction as a United States court of appeals and any other jurisdiction conferred on it by law, the United States Court of Appeals for the District of Columbia Circuit has jurisdiction of appeals from judgments of the District of Columbia Court of Appeals—

(1) with respect to violations of criminal laws of the United States which are not applicable exclusively to the District of Columbia if a petition for the allowance of an appeal from that judgment is filed within ten days after its entry; or

(2) entered before the effective date of the District of Columbia Court Reorganization Act of 1970 in any other case if a petition for the allowance of an appeal from that judgment is filed within ten days after its entry. (July 29, 1970, Pub. L. 91-358, § 111, title I, 84 Stat. 476.)"

District of Columbia Code Annotated § 11-321

"§ 11-321. Appellate jurisdiction

(a) In addition to its jurisdiction otherwise conferred by law, the United States Court of Appeals for the District of Columbia Circuit has jurisdiction of appeals from judgments of the District of Columbia Court of Appeals, including judgments of that court

rendered on review of orders and decisions of the administrative agencies of the District of Columbia specified by section 11-742(a).

(b) A party aggrieved by a judgment of the District of Columbia Court of Appeals may seek a review thereof by the United States Court of Appeals for the District of Columbia Circuit by petition for the allowance of an appeal. (Dec. 23, 1963, 77 Stat. 479, Pub. L. 88-241, eff. Jan. 1, 1964.)" REPEALED BY:

DISTRICT OF COLUMBIA COURT REFORM AND CRIMINAL PROCEDURE ACT OF 1970,

(July 29, 1970, Pub. L. 91-358, 84 Stat. 473).

"District of Columbia Court Reform and Criminal Procedure Act of 1970", (July 29, 1970, Pub. L. 91-358, 84 Stat. 473)

The Act of July 29, 1970, Pub. L. 91-358, 84 Stat. 473, known as the Court Reorganization Act completely revised title 11 of the District of Columbia Code Annotated and made other revisions and amendments to the Code.

The pertinent parts of the Act have been set forth above—namely District of Columbia Code Annotated § 11-102, § 11-301, as well as the repeal of former § 11-321.

STATEMENT OF THE CASE

The action was initially filed by the Petitioner in the Superior Court of the District of Columbia and Respondent removed the case to the United States District Court. Over objection, the case remained as a diversity action filed by the Petitioner against the law partners of Sidley & Austin, alleging *inter alia,*

misrepresentation and breach of fiduciary duties and praying for compensatory and punitive damages. Respondents moved for Summary Judgment and the District Court granted the Motion holding that the Petitioner could not establish a cause of action for misrepresentation since he was not deprived of any legal right and that there was no actionable breach of fiduciary duty since fiduciaries' concealment of their merger plans from the Petitioner produced neither financial loss to said Petitioner nor any profit to the offending parties, *Day* v. *Sidley & Austin,* 394 F. Supp. 986 (1975), Appendix B.

The Court of Appeals affirmed on the independent ground that while there was indeed a misrepresentation by a fiduciary,[1] there was no compensable injury [2] and that punitive damages could not be recovered in its absence—the law of the District of Columbia notwithstanding. Therefore, the Court of Appeals ruled that the Petitioner still lacked the requisite elements for his cause of action and affirmed the decision of the District Court.

A petition for rehearing on the issue of damages was later denied and a subsequent motion to file a supplemental petition for rehearing as to the profit gained by the fiduciary through the misrepresentation was treated only as a motion to stay the issuance of the mandate.

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[1] The misrepresentation was to the effect that the Petitioner would be no worse off if the merger were approved and ratified.

[2] The Court of Appeals held that the Petitioner could neither show any financial loss resulting from the misrepresentation nor any profit gained by the Respondents.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the District of Columbia Circuit Decided an Important District of Columbia Question Which Is in Conflict with the Established District of Columbia Common Law.

The common law of the District of Columbia permits punitive damages in the absence of compensable damage in cases of fraud, misrepresentation and deceit. *Harris* v. *Wagshal,* 343 A. 2nd 283, 288-289, note 13 (1975). This has been a longstanding rule in the District of Columbia, cf. *Wardman-Justice-Motors* v. *Petrie,* 39 F. 2nd 512 (C.A.D.C. 1930); *United Securities Corporation* v. *Franklin,* 180 A. 2nd 505 (D.C. Mun. App. 1962).

In reliance upon what is conceived to be the better rule of common law based on "history", the Court of Appeals for the District of Columbia Circuit rejected local precedent and held that punitive damages are barred in the case of misrepresentation absent a showing of compensable damage. The severity of the Court's violation of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) and its progeny [3] is manifestly demonstrated by the Court of Appeals' recognition of the District of Columbia law in footnote 58 of its opinion as follows:

> "In the District of Columbia, proof of fraudulent misrepresentation is itself sufficient to support an award of punitive damages, because of the state of mind rendering it fraudulent. *Harris* v. *Wagshal,* 343 A. 2nd 283, 288 (D.C. Ct. App. 1975); *District Motor Co.* v. *Rodill,* 88 A. 2nd 489, 492-493 (D.C. Mun. App. 1952)."

Appendix A, page 20a, note 58.

[3] The United States District Court for the District of Columbia has recognized that it is bound by the *Erie* doctrine. *Martin Marietta Corporation* v. *The Evening Star Newspaper Co.,* 417 F. Supp. 947, 957 note 9 (1976); *Cornwell* v. *C.I.T. Corp. of New York,* 373 F. Supp. 661, 664 (1974).

The Court of Appeals re-examined the local law of the District of Columbia and claimed that it is only by way of dicta that the District of Columbia courts had stated that ". . . in suits for misrepresentation damages may be awarded even absent compensatory damages." Appendix A, page 23a, note 67. Then, rejecting the local law as being only a minority view, the Court of Appeals relied on commentators and authorities from other states to decide that the better view is to require compensable injury as a condition to an award of punitive damages.

This glaring conflict with the District of Columbia's local common law compels the granting of certiorari to review the judgment below.

2. The Decision Below Raises Significant and Recurring Problems Concerning the Relationship Between the District of Columbia and the Federal Judicial System and the Rights of Litigants Seeking Redress in Those Systems.

(a) The effect of the decision below is to throw the law of torts concerning fraud and misrepresentation into disharmony in the District of Columbia, as the same tort has two different meanings depending upon which District of Columbia courthouse a party's case is docketed.

(b) It arbitrarily discriminates against a plaintiff, who would otherwise have a right to a federal forum, by depriving him of the opportunity to litigate his common law right to punitive damages in a case of fraud and misrepresentation in the federal judicial circuit for the District of Columbia.

(c) As in the instant case, it results in a dismissal, where if the case were tried in the local forum the right to a jury verdict would be maintained.

(d) It causes uncertainty to the plaintiff who litigates his claim in the local courts where the case may be subject to removal jurisdiction. By clever manipulation, a defendant might be able to remove a case to the federal forum and thus cause a bar to operate against plaintiff's common law remedies as was done in the instant case.

(e) The decision reflects an improper residue of the former—now repealed—relationship between the local and federal systems which existed when judgments of the District of Columbia Court of Appeals were subject to review by the United States Court of Appeals for the District of Columbia Circuit. *D.C. Code Ann.* § 11-321 (1967). This was changed by Congress by the passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473 (Court Reorganization Act). Decisions of the local appeals court are no longer subject to review by the United States Court of Appeals, *D.C. Code Ann.* § 11-301 (Supp. V. 1972). The District of Columbia Court of Appeals is now regarded as the "highest court of the District of Columbia" and is subject only to review by this Honorable Court, The Supreme Court of the United States, *D.C. Code Ann.* § 11-102.

The decision below, in the context of a diversity case, reflects an unacceptable harking back to the past practice of appellate review of local District of Columbia law by federal judges sitting in the District of Columbia. Rather than identify the law to be applied, the Court of Appeals for the District of Colum-

bia Circuit reviewed the local law, rejected it, and applied what *it* thought the law should be. While it had this appellate authority prior to 1970, after the Court Reorganization Act, the federal courts for the District of Columbia Circuit had only the power to interpret the local law and not determine it. Under *Erie,* a federal court cannot rewrite the local common law for the local jurisdiction but must simply apply it.

3. The United States District Court in Granting Defendants' Motion for Summary Judgment and the United States Court of Appeals in Affirming Said Decision of the Lower Court on Different Grounds Decided Factual Questions and Inferences Against the Petitioner and Thereby Violated His Constitutional Right to a Jury Trial.

The United States Court of Appeals, in affirming the lower court's decision on different grounds, held that there was an actionable case of misrepresentation but that there was an absence of compensable damages directly caused to the Petitioner or resulting profit to the Respondents. In so holding, the court of Appeals recognized that all facts averred by the Petitioner and all reasonable inferences therefrom must be taken as true. Thus, the Court held that the allegations of misrepresentation made by the Respondents to the Petitioner established an actionable cause of misrepresentation.

However, in relation to the question of damages, the Court of Appeals affirmed the factual decisions made by the lower court and went on to conclude other factual questions and inferences against the Petitioner. The court concluded that the misrepresentations did not cause the Petitioner compensable damages even though the tortious conduct of the Respondents was the concealment of a plan to demote the Petitioner

and to diminish his authority and influence in the firm's affairs which thereby adversely affected his reputation and caused him a subsequent loss of income. The court's reasoning in this regard was that the Petitioner could not have prevented the merger or his injuries even if he had been aware of the scheme.

Such a factual determination by the Court of Appeals for the District of Columbia Circuit flies in the face of the reasonable inferences which should have been drawn in favor of the Petitioner. The Petitioner, J. Edward Day, is a former Postmaster General of the United States and was, at the time of the merger discussions, a long-standing partner of the Sidley & Austin firm and Chairman of its Washington, D.C. office. While it may be true that Petitioner himself could not on contractual grounds have blocked the merger, the court also decided without any support therefor, that Mr. Day, even if he had been aware of the clandestine scheme to undermine him, could not have influenced the majority of his fellow partners to either oppose those aspects of the merger which had a detrimental affect on his position or alternatively to oppose the entire merger agreement.

The court illogically and erroneously assumes that to prevent any of the injuries and damages which were caused the Petitioner, the entire merger would have had to have been voted down. Thereby, the court clairvoyantly determines as a "fact" that Mr. Day could not have persuaded a *significant* number of his fellows to join him in seeking the deletion of the injurious aspects of the merger or in suggesting curative amendments to the merger proposal.

Additionally, the court, on some unexplained basis, concludes as a fact that the misrepresentation of the fiduciaries did not result in any profit to them. This assumes that even if Mr. Day had been aware of the true intentions of the fiduciaries and had made substantial efforts to gain the support of his fellow partners in either amending the merger or opposing it, then this would not have necessarily hampered and delayed the fruition of the merger even if his efforts to alter its course or prevent it were not successful. As it was, however, his fiduciaries profited at his loss by the minimization of expense in the ramrodding of the merger's acceptance without having to address all the questions, suggested amendments and objections which would have flowed from Mr. Day and his supporters. Thus, in addition to the damages suffered by Mr. Day, profit was netted to the Respondents by their misrepresentations.

In deciding these inferences and questions of fact against the Petitioner, the Court of Appeals failed to act in accordance with its recognized limitations of review in that all of the facts averred by the Petitioner and the reasonable inferences therefrom were not taken as true. Therefore, the United States District Court and the United States Court of Appeals denied the Petitioner his Constitutional right, guaranteed by the 7th Amendment, to have debatable factual questions determined by a jury. *International Terminal Operating Co.* v. *N. V. Nederl. A. Merk. Stoomv. MATTS,* 393 U.S. 74, 89 S. Ct. 53, 21 L. Ed. 2d 58 (1968); *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines,* 369 U.S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962); *Galloway* v. *United States,* 319 U.S. 372, 63

S. Ct. 1077, 87 L. Ed. 1458 (1943); *Baylis* v. *Travelers' Insurance Co.*, 113 U.S. 316, 5 S.Ct. 494, 28 L. Ed. 989 (N.Y. 1885).

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1744

J. EDWARD DAY, *Appellant*

v.

WILLIAM H. AVERY, ET AL.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 74-1112)

Argued March 30, 1976

Decided November 10, 1976

Austin F. Canfield, Jr., with whom *Edward J. Gorman, Jr.*, was on the brief for appellant.

James J. Bierbower, with whom *Alvin B. Davis*, was on the brief for appellees.

Before: TAMM, ROBINSON and WILKEY, *Circuit Judges*

PER CURIAM: Appellant J. Edward Day brought suit in the Superior Court of the District of Columbia against Sidley & Austin (S&A), a prominent Chicago law firm, and the partners composing its executive committee, as the upshot of a dispute engendered by S&A's merger

with another law firm in 1972. In separate counts of his complaint, appellant alleged, *inter alia,* breach of contract and misrepresentation. Service of process on the partnership was quashed and the case was thereafter removed to the United States District Court for the District of Columbia, which entered summary judgment for the individual defendants on all counts.[1] That judgment is now appealed on the merits of each claim for relief, as well as on the propriety of the removal. We affirm the judgment in all respects.

I. The Factual Background

In 1963, appellant and S&A agreed that appellant would, upon his resignation as Postmaster General of the United States, establish an office of S&A in Washington, D.C. He did so, securing office space and supporting personnel for himself and for the small group of S&A attorneys who staffed the office. At the same time, appellant became an underwriting partner in the firm and chairman of its Washington office committee. He did not, however, become a member of the firm's executive committee, which under S&A's partnership agreement had plenary control over most of the firm's affairs calling for policy- or decision-making.[2] Appellant's role

[1] *Day* v. *Sidley & Austin,* 394 F.Supp. 986 (D.D.C. 1975).

[2] Under S&A's 1970 partnership agreement, the executive committee consisted of underwriting partners elected by partners holding a majority of all voting percentages. The committee was empowered by the agreement to (1) reduce a partner's participation in the event of an "abnormal reduction" in his workload; (2) determine whether a partner was disabled; (3) request retired partners to serve as consultants to the firm; (4) determine certain portions of benefits payable on withdrawal or death of a partner; (5) give or withhold consent to a partner's request to practice law outside the firm; (6) determine "[a]ll questions of Firm policy, including determination of salaries, expense, Partners' participation, required balances of Partners, investment of funds, designation of Counsel, and the admission and severance of Partners," subject to approval by a voting majority of all the partners on matters of participation, admission and severance; (7) approve partners' service as fiduciaries or as directors of other enterprises, and determine whether partners so serving might retain fees; and (8) select an accounting firm for auditing purposes. J. App. 206-212.

as chairman of the Washington office committee was principally that of liaison with and agent for the executive committee, rather than that of independent decision-maker.

Early in 1972, S&A's executive committee was approached by partners of another law firm—Liebman, Williams, Bennett, Baird & Minow (Liebman)—with an eye toward merger. Like S&A, Liebman was Chicago-based but maintained an office in Washington. Without then notifying other partners,[3] representatives of Liebman and S&A's executive committee explored the idea and thrashed out a tentative proposal. The possibility of merger was first broached to appellant and the other underwriting partners at a meeting on July 17, 1972, when the proposal was presented to them for consideration. In the course of the discussions, according to appellant, the executive committee made a series of statements to the underwriting partners about the contemplated merger, including a representation that no one of them would be "worse off" in any way as a result.[4]

Each underwriting partner, including appellant, voiced approval of the project, and commissioned the executive committee to devise a final-form merger agreement and submit it to the partners for adoption. Several other meetings were held to resolve merger issues during September and, although appellant found himself unable to attend any of them, one clause of the agreement was

[3] Secrecy for the time being, quite understandably, was deemed necessary to protect against speculation and unrest while the proposal was still in a highly tentative stage.

[4] J.App. 235.

revised at his suggestion. A memorandum purporting to summarize the benefits of the merger was circulated under the aegis of the executive committee to all S&A partners on September 26, and that memorandum contained the statement that no partner would be "worse off" financially "solely as a result of the consolidation, than he or she was before the event."[5] After circulation and approval of a memorandum of understanding incorporating the details of the merger, a final amended partnership agreement consummating the merger was executed on October 16, 1972, by all partners of S&A, including appellant.

That same day, the executive committee of the new firm—which took the name of "Sidley & Austin"—decided to consolidate the Washington offices of its predecessors. To this end, appellant and the head of the pre-merger Liebman Washington office committee, who was also a member of the post-merger executive committee, were named co-chairmen of the consolidated Washington office committee.[6] It was at this point that trouble began. Members of the post-merger Washington office committee, in combination with appellant's co-head, took actions that seemed to appellant to be in disregard of his role as co-chairman and in studied neglect of his wishes. The principal step was the relocation of the consolidated offices to another building in Washington, a move to which appellant was opposed. Appellant considered this course contumelious and alleges that it was motivated by opposition to his political leanings. These events, as well as the appointment of co-chairmen *simpliciter*, made continued service with the firm distasteful to appellant, who resigned and instituted the instant litigation.

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[5] J.App. 60.

[6] Appellant avers, and one defendant admits, that this arrangement was contemplated far earlier than October 16, 1972.

II. Removal of the Action

Appellant first challenges the District Court's jurisdiction. Removal of the case from the Superior Court of the District of Columbia rested on the theory that the S&A firm was not suable as an entity in the District of Columbia; that there was complete diversity of citizenship between appellant on the one hand and the defendant partners on the other; that the amount in controversy, exclusive of interest and costs, exceeded $10,000; and that since appellant's action might originally have been brought in the District Court,[7] it was properly removable thereto.[8] Since, however, an action involving no federal question cannot be removed to a federal court if any defendant is a resident of the forum state,[9] appellant contends that removal in this instance was improper. His premise is that even though none of the partners sued individually resides in the District of Columbia, S&A, *qua* partnership, does so reside by virtue of its business activity here.

Federal Civil Rule 17(b)[10] provides that in cases not

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[7] See 28 U.S.C. § 1332(a) (1970).

[8] "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a) (1975).

[9] 28 U.S.C. § 1441(b) (1970); *Patch* v. *Wabash R. Co.*, 207 U.S. 277, 28 S.Ct. 80, 52 L.Ed. 204 (1907).

[10] "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which

seeking enforcement of a substantive right[11] existing under the constitution or a federal law, capacity of a partnership to sue or be sued is determined by reference to the law of the forum state—in this case, the Dis-

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has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. §§ 754 and 959(a)." Fed. R.Civ.P. 17(b).

[11] See note 10 *supra*. Appellant endeavors to find a "substantive right" under federal law in the District of Columbia's "long arm" jurisdiction statute, enacted as a part of Pub.L. No. 91-358, 84 Stat. 548 (1970), the District of Columbia Court Reform and Criminal Procedure Act of 1970, and codified as D.C. Code §§ 13-40[1] *et seq.* (1973). These statute subjects all "persons" meeting certain minimum contacts requirements to the jurisdiction of the local courts and, in § 13-421, definies "persons" as including partnerships and other sorts of unincorporated associations. Appellant's claim, then, is that the long-arm statute gave him a "substantive right" to subject partnerships to personal jurisdiction in litigation in the District of Columbia. That deviation from the general rule of Rule 17(b), see note 10 *supra*, lacks the content and broad scope which the term "substance" possesses when it is juxtaposed to "procedure" in the argot of *Erie* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Rather, it represents an amplification of the doctrine of *UMW* v. *Coronado Coal Co.*, 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975 (1922), as interpreted by *Brown* v. *United States*, 276 U.S. 134, 141-142, 48 S.Ct. 288, 289-290, 72 L.Ed. 500, 503-504 (1928), that unincorporated associations might be sued on federal causes of action where the federal claims imply such a capacity to be sued, *e.g.*, antitrust actions. While the term "substantive rights" has been interpreted to embrace every manner of claim for relief—whether constitutional, *e.g.*, *Council No. 34, AFSCME* v. *Ogilive*, 465 F.2d 221 (7th Cir. 1972); *statutory*, *e.g.*, *Petrol Shipping Corp.* v. *Kingdom of Greece*, 360 F.2d 103, *cert. denied*, 385 U.S. 931, 87 S.Ct. 291, 17 L.Ed.2d 213 (1966) (suit to compel arbitration under Federal Arbitration Act); *Price* v. *UMW*, 336 F.2d 771 (1964), *cert. denied*, 380 U.S. 913, 85 S.Ct. 899, 13 L.Ed.2d 799 (1965) (secondary boycott action under § 303

trict.[12] Since there is no statute in the District permitting suit by or against a partnership in its common name, and since by the common law of the District a partnership is not a jural entity capable of suing or being sued,[13] this argument would appear to be foreclosed. Appellant maintains, however, that Section 13-421 of the District of Columbia Code impliedly overrules the case law on this point by conferring personal jurisdiction over partnerships and other unincorporated associations meeting certain minimum contacts requirements.[14]

We note initially that the fact of personal jurisdiction does not ineluctably bestow legal capacity to be sued; infants and incompetents, for instance, were at common law incapacited from suing or being sued,[15] and the fact

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of the Labor Management Relations Act); implied from a criminal statute, *National Ass'n for Community Dev.* v. *Hodgson*, 356 F. Supp. 1399 (D.D.C. 1973); or even developed as federal common law under § 301 of the LMRA, *Jersey Farms Milk Service, Inc.* v. *Amalgamated Meat Cutters*, 297 F.Supp. 1098 (M.D.Tenn. 1969) —Rule 17(b) has never recognized a federal substantive right other than a claim for relief, and certainly not a "right" akin to that asserted by appellant.

[12] Fed. R. Civ. P. 81(e).

[13] *Fennell* v. *Bache*, 74 App.D.C. 247, 250, 123 F.2d 905, 908, *cert. denied*, 314 U.S. 689, 62 S.Ct. 359, 86 L.Ed. 551 (1941); *Matson* v. *Mackubin*, 61 App.D.C. 102, 57 F.2d 941 (1932); *Mayflower Hotel Stockholders* v. *Mayflower Hotel Corp.*, 73 F.Supp. 721 (D.D.C. 1947), *rev'd on other grounds*, 84 U.S.App.D.C. 275, 173 F.2d 416 (1949); see *National Ass'n for Community Dev.* v. *Hodgson, supra* note 11, 356 F.Supp. at 1402; *cf. United States* v. *A & P Trucking Co.*, 358 U.S. 121, 124, 79 S.Ct. 203, 206, 3 L.Ed.2d 165, 169 (1958).

[14] See note 11 *supra*.

[15] *Infants: Peak* v. *Shasted*, 21 Ill. 137, 74 Am. Dec. 83 (1859); In re Beghtel's Estate, 236 Iowa 953, 20 N.W.2d 421, 161 A.L.R. 1384 (1945); *Austin* v. *Charlestown Female Seminary*, 8 Met. 196, 41 Am. Dec. 497 (Mass. 1844); *Scott* v. *Royston*, 223 Mo. 568, 123

that they were subject to personal jurisdiction did not alter the necessity of appointing a guardian ad litem.[16] More importantly, the genealogy of the District of Columbia's long-arm statute gives no indication that it was intended to do anything but "codify recent case law with respect to extraterriotorial jurisdiction over and service upon persons in civil litigation."[17] It was adapted by Congress from the Uniform Interstate and International Procedure Act,[18] which in its pertinent comments assures that its adoption effects "no change" of rules "stating which persons have to be served in order to acquire jurisdiction," and that "thus, local law that all members of an unincorporated association must be joined and served . . .

S.W. 454 (1909); *Manfull* v. *Graham*, 55 Neb. 645, 76 N.W. 19 (1898); *Drago* v. *Moso*, 40 Am. Dec. 592 (S.C. 1843); *Geilinger* v. *Gibbs* [1897] 1 Ch. 497. *Incompetents: Miller* v. *Hart*, 135 Ind. 201, 34 N.E. 1003, 1004 (1893).

[16] Infants and incompetents were subject to suit only upon the appointment of a guardian ad litem or other representative responsible to the court. These might be appointed by the court itself once it acquired jurisdiction over the minor or incompetent by proper service of process. See, *e.g.*, *Miller* v. *Hart*, *supra* note 15, 34 N.E. at 1004; *Fulton* v. *Roosevelt*, 1 Paige Ch. 178, 19 Am. Dec. 409 (N.Y. 1828). The party's infancy or incompetency did not deprive the court of jurisdiction, see *Jones* v. *Schaffner*, 193 Iowa 1262, 188 N.W. 787, 790 (1922); *Grattan* v. *Grattan*, 18 Ill. 167, 65 Am. Dec. 726, 729 (1956), and pleas of infancy were made by pleas in abatement and were not jurisdictional pleas, which had to be pleaded in bar. 1 Chitty, Pleadings and Parties to Actions 446-48 (10th Amer. ed. 1847); H. Stephen, Principles of Pleading 47 (9th Amer. ed. Heard 1867). Judgments improperly rendered against an infant who had not been represented by guardian ad litem were not void, as for lack of jurisdiction, but voidable. *Peak* v. *Shasted*, *supra* note 15; *Austin* v. *Charlestown Female Seminary*, *supra* note 15; *Manfull* v. *Graham*, *supra* note 15.

[17] S. Rep. No. 405, 91st Cong., 1st Sess. 35 (1969).

[18] 13 Uniform Laws Annotated (U.L.A.) 283 (1975).

remains unchanged."[19] Since both the Uniform Act and its District of Columbia counterpart accord identical treatment to partnerships and unincorporated associations,[20] the law governing service on partnerships remain unchanged: the partnership entity is never to be served; rather, service must be made on all partners.[21]

A fortiori, then, the District's preexisting rules of suability are unaltered by the enactment of Section 13-421. In this connection, it is worth noting that one of Congress' purposes in adopting its provisions was closely to assimilate District law on jurisdiction to that of the neighboring states of Virginia and Maryland.[22] Virginia, though it has a nearly identical statute, denies partnerships capacity to sue or be sued,[23] as does at least one other state that has adopted the Uniform Act.[24] We conclude, then, that appellant's contention must be rejected and that removal was proper in the circumstances.[25]

[19] *Id.* at 284, Commissioners' Comments to § 1.02. *Cf. id.* at 283, Comments to § 1.01: "In some cases the law of a state may require service on one or more specific individuals in order for jurisdiction to be acquired over a person"; *id.* at 298, § 2.03: "When the law of this state requires that in order to effect service one or more designated individuals be served, service outside this state under this Article must be made upon the designated individual or individuals."

[20] D.C. Code § 13-421 (1973); Uniform Interstate and International Procedure Act § 1.01, 13 U.L.A. at 283 (1975).

[21] *Matson* v. *Mackubin*, *supra* note 13.

[22] S. Rep. No. 405, 91st Cong., 1st Sess. 35 (1969); H.R. Rep. No. 907, 91st Cong., 1st Sess. 61 (1970); *Margoles* v. *Johns*, 157 U.S.App.D.C. 209, 212-213, 483 F.2d 1212, 1215-1216 (1973).

[23] *McCormick* v. *Romans*, 214 Va. 144, 198 S.E.2d 651 (1973).

[24] *Roberts-Haverhill Associates* v. *City Council of Haverhill*, 319 N.E.2d 916 (Mass. App. 1974).

[25] Since we find that S&A, *qua* partnership, may not be sued in the District of Columbia, we need not inquire into the "residence"

III. The Breach of Contract Claim

Appellant disputes the District Court's finding, on which the breach-of-contract count of his complaint was held wanting, that he had no contractual right "to maintain his authority over the Washington office." [26] That effort, too, must fail. Neither S&A's pre-merger partnership agreement nor the amended partnership agreement governing post-merger operations refers to the Washington office committee or to appellant's position thereon. The pre-merger agreement, however, does provide that "[a]ll questions of Firm policy," except for certain enumerated matters not here relevant, shall be decided by the executive committee, which "shall advise and consult with other Partners to such an extent as the Committee may deem advisable." [27] Clearly the establishment of the Washington office committee, its staffing and tenure upon it all fell under the rubric "firm policy," and as such were committed to the discretion of the executive committee. And insofar as there were techniques for "advising and consulting" with other partners, recourse to them was expressly left to the committee's own good sense and no abuse here is apparent. That agreement, moreover, specifically incorporated special agreements with several other partners but omitted reference to any idosyncratic arrangement with appellant that might limit the executive committee's prerogative in that regard.

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of the partnership, either for purposes of determining whether there is diversity, see *United Steelworkers of America* v. *R. H. Bouligny, Inc.*, 382 U.S. 145, 150, 86 S.Ct. 272, 274-275, 15 L.Ed.2d 217, 220 (1965); *Fifty Associates* v. *Prudential Ins. Co. of America*, 446 F.2d 1187, 1190 (9th Cir. 1970); or for evaluating venue in the District of Columbia, see *Denver & Rio Grande Western R. Co.* v. *Brotherhood of R.R. Trainmen*, 387 U.S. 556, 560, 87 S.Ct. 1746, 1748-1749, 18 L.Ed. 954, 958 (1967); *Penrod Drilling Co.* v. *Johnson*, 414 F.2d 1217, 1221 (1969), *cert. denied*, 396 U.S. 1003, 90 S.Ct. 552, 24 L.Ed.2d 495 (1970).

[26] *Day* v. *Sidley & Austin, supra* note 1, 394 F.Supp. at 992.

[27] J.App. 221.

Beyond these considerations, both the pre- and post-merger partnership agreements empowered the executive committee to establish, determine the chairmanship and composition of, and abolish at will, any subordinate committee of the firm.[28] We are unable to perceive any basis upon which it might soundly be concluded that the appointment of two chairmen for the firm's new Washington office committee was not well within the committee's authority.

It is well settled [29] that where, as here, a written agreement purportedly represents the parties' complete expression of their relationship, neither is at liberty to modify any of its terms by parol evidence.[30] This wholesome principle safeguards the integrity of partnership agreements no less than others.[31] And quite apart from

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[28] The 1970 Partnership Agreement made no mention of any Firm committee other than the executive committee, which was to decide "[a]ll questions of Firm policy," and might "advise and consult with other Partners to such an extent as the Committee may deem advisable and in the best interest of the Firm." J.App. 212. The 1972 Agreement retains all of the above verbiage, together with some more specific language:

> The Executive Committee shall appoint a Management Committee and such subordinate administrative committees as it may deem advisable. The Management Committee shall have general responsibility and authority for the administration of the affairs of the Firm and general supervision over the administrative committees.

[29] Since in all material respects save possibly one, see note 67 *infra*, the substantive law of Illinois and the District of Columbia is substantially harmonious, we need not inquire which is controlling on the substantive questions presented on this appeal.

[30] *E.g.*, *Murray* v. *Lichtman*, 119 U.S.App.D.C. 250, 251, 339 F.2d 749, 51 (1964) (quoting 3 A. Corbin, Contracts § 573 (1960)); *Gibson* v. *United States*, 106 U.S.App.D.C. 10, 12-13, 268 F.2d 586, 588-589 (1959). See generally 9 J. Wigmore, Evidence § 2425 (3d ed. 1940).

[31] *E.g.*, *Parish* v. *Howard*, 459 F.2d 616, 618 (8th Cir. 1972);

the parol evidence questions raised by appellant's attempt to supply an additional unwritten term to his relations with S&A,[32] its absence from an otherwise carefully drawn document covering the complex operations of a large law firm requires, as the District Court noted, "a measured explanation which [appellant] does not supply."[33] We sustain the court's finding that no foundation for appellant's breach-of-contract claim was shown.

IV. The Misrepresentation Claim

Count three of appellant's complaint alleges, and seeks damages for, several misrepresentations made by members of S&A's executive committee to the underwriting partners assembled in the pre-merger meeting of July 17, 1972. The District Court gave summary judgment against appellant on this count on the theory that he was deprived of no legal right as a consequence of his reliance

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VanFleet-Durkee, Inc. v. *Oyster*, 91 Cal. App. 2d. 411, 205 P.2d 32 (1949).

[32] Oral evidence may be adduced to show that an agreement in writing never became effective, 4 S. Williston, Contracts § 634 (3d ed. Jaeger 1961), as where there is fraud in the inducement or a condition precedent remaining unsatisfied. Appellant does not aver facts that would suggest that his 1963 agreement with S&A or its 1970 partnership agreement is vitiated by fraud, but he does characterize his continuation as head of the Washington office as a condition precedent to their operation. Appellant thus asks us to postulate the existence of a condition that could not be satisfied until he had left S&A, that is, until the contract had been fully performed. Such a characterization does not fit within the definition of conditions precedent as "facts and events . . . that must exist or occur before there is a right to immediate performance, before there is a breach of duty, before the usual judicial remedies are available." 3A A. Corbin, Contracts § 628 at 16 (1960); 5 S. Williston, Contracts, *supra* at § 666A.

[33] *Day* v. *Sidley & Austin, supra* note 1, 394 F. Supp. at 991.

on any misrepresentation charged.[34] We reach the same result, though on different grounds.

Of the misrepresentations alleged, the only one that need concern us[35] is the observation by one of the members of the executive committee that "no Sidley partner would be worse off as a result of the merger."[36] Since an action for misrepresentation[37] generally will lie only if there has been a conscious misrepresentation of a material fact,[38] a statement that one would or would not be worse off in the future—whether characterized as a prediction, opinion or promise[39]—ordinarily would not be a sufficient predicate for such an action as between parties truly dealing at arms' length.[40]

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[34] *Id.* at 992.

[35] Appellant also alleged deliberate misstatements as to the future plans of two Liebman partners and the resolution of a potential conflict of interest between the clients of the merged firm. Neither the District Court nor we can discern a meritorious claim for relief in these allegations. See 394 F. Supp. at 991.

[36] J.App. 235. As we have already noted, a substantially similar statement appeared in a memorandum circulated to S&A partners shortly before approval of the merger. See text *supra* at note 5.

[37] The tort is frequently spoken of as "deceit," since the action of deceit was the appropriate remedy under the early common law. See W. Prosser, Torts §105 at 684-686 (4th ed. 1971).

[38] *Id.* § 105 at 685; 1 F. Harper & F. James, Torts § 7.8 (1956).

[39] A promise or contractual commitment may be actionable as a misrepresentation if at the time of its making the promisor had no intention of carrying it out. W. Prosser, Torts § 109 at 729-730 (4th ed. 1971); 1 F. Harper & F. James, Torts § 7.10 at 571-574 (1956). Although it is possible to infer such an intention from the actions and circumstances of the promisor, see W. Prosser, *supra*, § 109 at 730, appellant does not aver, and we cannot conceive, that the assertion in question was intended as a promise.

[40] W. Prosser, Torts § 109 at 728 (4th ed. 1971); F. Harper & F. James, Torts § 7.8 at 561 (1956). Professor Prosser attributes this rule to "the highly individualistic attitude of the common

Where circumstances indicate that the parties did not stand in a position of parity and normal wariness with respect to the subject of the representation, however, exceptions have been carved out of the general rule.[41] Most of these exceptions derive their legitimacy from circumstances that would lead the reasonable person to believe that implicit in the prediction or opinion is an assertion of fact upon which the recipient of the representation might prudently rely. Where the person making the representation occupies a fiduciary or other position of trust for the recipient of his remarks, for instance, the recipient may be justified in assuming the correctness not only of factual representations but also of opinions.[42] The intuitive basis for this result may be the thought that a fiduciary voicing an opinion on which he knew his beneficiary might depend would be understood as having investigated the facts underlying it; thus the expression of the opinion carried an implicit representation of those facts. Since partners as to partnership matters are fiduciaries *inter se*,[43] it is often found that

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law toward the bargaining transactions with which the law of deceit has developed." W. Prosser, Torts § 109 at 721.

[41] W. Prosser, Torts § 109 at 728 (4th ed. 1971); F. Harper & F. James, Torts § 7.8 at 561 (1956).

[42] *Ringer* v. *First Nat'l Bank of Stevenson*, 291 Ala. 364, 281 So.2d 261, 267 (1973); *Ogier* v. *Pacific Oil & Gas Dev. Corp.*, 132 Cal. App. 2d 496, 282 P.2d 574, 580 (1955); W. Prosser, Torts § 109 at 726 (4th ed. 1971); F. Harper & F. James, Torts § 7.8 at 563-564 (1956); see *Illinois Rockford Corp.* v. *Kulp*, 41 Ill.2d 215, 242 N.E.2d 228 (1968); *cf. Riss & Co.* v. *Feldman*, 79 A.2d 566, 571 (D.C.Mun.Ct.App. 1951); see also *Meinhard* v. *Salmon*, 249 N.Y. 458, 463-464, 164 N.E. 545, 546, 62 A.L.R. 1 (1928).

[43] Uniform Partnership Act § 21, enacted as D.C. Code § 41-320 (1973), and as Ill. Rev. Stat. ch. 106-½ §18 (1973); *Peterson* v. *Tharp*, 299 F.2d 434 (5th Cir.), *cert. denied*, 371 U.S. 889, 83 S.Ct. 184, 9 L.Ed.2d 122 (1962); *Homestake Mining Co.* v. *Mid-Continent Exploration Co.*, 282 F.2d 787, 799 (10th Cir. 1960); *Riss &*

partners were intitled to rely on the opinions of their colleagues.[44]

Another exception to the general requirement that the misrepresentation be one of existing fact appears in the situation where the speaker may reasonably be understood as having based an opinion or prediction on facts that are unavailable to the listener either because he does not have access to them or because he is obviously incapable of interpreting them.[45] Still a third exception is based upon the logical assumption that one who asserts that a future event will come to pass impliedly warrants that he knows of no fact that will prevent its occurrence.[46]

Co. v. *Feldman*, *supra* note 42; *Clement* v. *Clement*, 436 Pa. 466, 260 A.2d 728 (1970); A. Bromberg, J. Crane & A. Bromberg, Partnership § 68 (1968); *cf. Dresden* v. *Willock*, 518 F.2d 281, 287 (3rd Cir. 1975) (co-owners of business may be fiduciaries in some circumstances); *Illinois Rockford Corp.* v. *Kulp*, *supra* note 42 (same); *Frankfort Oil Co.* v. *Snakard*, 279 F.2d 436, 443 (10th Cir.), *cert. denied*, 364 U.S. 920, 81 S.Ct. 282, 5 L.Ed.2d 259 (1960) (joint venturers are fiduciaries).

[44] *Wolf* v. *Brungardt*, 215 Kan. 272, 524 P.2d 726 (1974); *Clement* v. *Clement*, *supra* note 43; *Herring* v. *Offutt*, 266 Md. 593, 295 A.2d 876, 879 (Md. 1972); see *Lewis* v. *State Bar*, 9 Cal.3d 704, 511 P.2d 1173 (1973) (same in disbarment proceeding).

[45] *Ryan* v. *Glenn*, 489 F.2d 110, 114 (5th Cir. 1974); *Carroll* v. *First Nat'l Bank of Lincolnwood*, 413 F.2d 353, 358-359 (7th Cir. 1969), *cert. denied*, 396 U.S. 1003, 90 S.Ct. 552, 24 L.Ed.2d 494 (1970); *Riss & Co.* v. *Feldman*, *supra* note 42; *Vokes* v. *Arthur Murray, Inc.*, 212 So. 2d 906, 909, 28 A.L.R.3d 1405 (Fla. App. 1968); *Wolf* v. *Brungardt*, *supra* note 44; *Ragsdale* v. *Kennedy*, 286 N.C. 130, 209 S.E.2d 494, 500-501 (1974); Restatement, Torts § 525 (1938); *cf. Dresden* v. *Willock*, *supra* note 43.

[46] *United States* v. *Herr*, 338 F.2d 607, 610 (7th Cir. 1964), *cert. denied*, 382 U.S. 999, 86 S.Ct. 563, 15 L.Ed.2d 487 (1966); W. Prosser, Torts § 109 at 728 (4th ed. 1971); F. Harper & F. James, Torts § 7.10 at 791 (1956). *Cf.* Restatement, Torts § 525, Comment (e) (1938):

> A statement in form a prediction or promise as to the future

We need not decide whether any of these circumstances, standing alone, would support an action for misrepresentation based on opinion or prediction for, taking appellant's averments to be true, all these factors are present in this case. Both sides agree that although appellant was an underwriting partner, the structure of the firm was such that in many ways he was never master of his own ship. When the executive committee member asserted that no one, including appellant, would be worse off as a result of the merger, appellant was entitled to rely on that opinion—the opinion of one who not only was his partner and hence a fiduciary but who also occupied a special position of trust and confidence by virtue of the control[47] he wielded over appellant's fortunes with S&A.[48] Furthermore, the speaker might well have been understood by appellant as having based his statement on a great deal of information to which, as both sides agree, appellant did not have access; appellant's ascertainment of the past and present prospects not only of the Liebman firm but also of his own was hampered by the secrecy surrounding the internal dealings on the merger proposal, to which all of the defendants were admittedly privy.[49] Certainly appellant was justified in accepting the conclusion of a partner armed with superior knowledge of the underlying facts, least to the extent of assuming that the partner knew of no facts that would prevent his own prophecy

course of events may justifiably be interpreted as a statement that the maker knows of nothing which will make the fulfillment of his prediction or promise impossible or improbable.

[47] See note 2 *supra*.

[48] Appellant avers that part of the reason why he relied upon the alleged misrepresentation is that he "had always trusted the Defendants who had assumed management of the firm. In addition, they had control over my status and income." J.App. 233.

[49] See note 5 *supra* and accompanying text.

from being fulfilled. And finally, the prediction in question was of a state of affairs the occurrence of which was partly in the hands of the declarant and his compatriots on the executive committee. Appellant might reasonably presume that the committee would not forecast one future and then work actively to bring about quite a different one.[50]

Taking, then—as we are required, for purposes of evaluating the District Court's grant of summary judgment to do—all facts averred by appellant as true and indulging all reasonable inferences from his averments, we must view the situation as though the defendant partners made or caused to be made a material misrepresentation in the form of an opinion on which appellant might justifiably accept. We must also assume arguendo that the inaccuracy of the assertion was known to the defendants at the time it was made, that they intended that appellant rely upon it, and that in fact he did rely upon it.[51] Still, we find, appellant did not establish all of the essential elements of his claim.

A necessary ingredient of the tort of misrepresentation—as, in olden times, of any action on the case[52]—is

[50] Compare the authorities cited *supra* note 31 with those holding promisors liable in misrepresentation for promises made with an intention never to carry them out. *United States* v. *Herr*, *supra* note 46, 338 F.2d at 610; *United States* v. *1,557.28 Acres of Land*, 486 F.2d 445, 447-448 (10th Cir. 1973); *Brooks* v. *Parr*, 507 S.W. 2d 818 (Tex. Civ. App. 1974); W. Prosser, Torts § 109 at 730-731 (4th ed. 1971).

[51] Numerous authorities caution that summary judgment is not ordinarily appropriate in cases posing an issue as to state of mind. *Bouchard* v. *Washington*, 168 U.S.App.D.C. 402, 404 n.20, 514 F.2d 824, 830 n.20 (1975); *Washington Post Co.* v. *Keogh*, 125 U.S.App. D.C. 32, 34, 365 F.2d 965, 967 (1966), *cert. denied*, 385 U.S. 1011, 87 S.Ct. 708, 17 L.Ed.2d 548 (1967); *Dewey* v. *Clark*, 86 U.S.App. D.C. 137, 144, 180 F2d 766, 773 (1950); *Riley-Stabler Constr. Co.* v. *Westinghouse Elec. Corp.*, 396 F.2d 274, 277 (5th Cir. 1968).

[52] C. McCormick, Damages § 22 at 87-88 (1935); W. Prosser,

that the claimant suffer harm by reason of the tortious conduct.[53] Appellant has demonstrated no ability to prove, in the event of a trial, any causal connection between the misrepresentation and the injury which he charges. The only damage to which he points was his outraged sensibilities, which assertedly flowed not from the pre-merger prediction that no one would be worse off, but from the executive committee's action in regard to stewardship of the post-merger Washington office. The legal immateriality of the alleged misrepresentation—in effect, the concealment of a plan to depose appellant as head of the Washington office after the merger—becomes apparent when it is recognized that the same result would almost certainly have obtained had appellant been fully informed of every intention he avers the executive committee harbored. If appellant had known that the merger was to be a springboard for lowering his status in the Washington office, as he now claims it was, he could not alone have prevented consummation of the merger. In any determination of the relations of partners *inter se*, the primary reference is to the terms of

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Torts § at 28-29 (4th ed. 1971); see R. Heusten, Salmond on the Law of Torts 6 (16th ed. 1973):

> In case, damage is the gist of the action, and the plaintiff will fail if he cannot prove it. But in trespass it is not necessary to prove actual damage. Trespass is actionable *per se*.

[53] *Isen* v. *Calvert Corp.*, 126 U.S.App.D.C. 349, 353, 379 F.2d 126, 130 (1967); *Ritchie* v. *Landau*, 475 F.2d 151, 156 (2d Cir. 1973); *Seattle First Nat'l Bank* v. *Hilltop Realty*, 383 F.2d 309, 313 (9th Cir. 1967), *cert. denied*, 390 U.S. 1025, 88 S.Ct. 1411, 20 L.Ed.2d 282 (1968); *Kaufman* v. *Mellon Nat'l Bank & Trust Co.*, 366 F.2d 326, 331 (3rd Cir. 1966); *Lack Indus., Inc.* v. *Ralston Purina Co.*, 327 F.2d 266 (8th Cir. 1964); *Jones & Laughlin Steel Corp.* v. *Sedalia Indus. Loan & Inv. Co.*, 315 F.2d 58 (8th Cir. 1963); W. Prosser, Torts § 110 at 731 (4th ed. 1971); F. Harper & F. James, Torts § 7.15 at 590-591; C. McCormick, Damages § 22 at 88-89 (1935); Restatement, Torts § 546 (1938); Restatement (Second) of Torts § 548A (Tentative Draft No. 10, 1964).

the partnership agreement;[54] and under S&A's pre-merger partnership agreement, appellant's vote was not necessary to effect the merger nor sufficient to defeat it.[55] Although it is not absolutely inconceivable that he could have persuaded his colleagues to preserve his authority over the Washington office by rejecting the merger, he avers no facts from which such a probability might realistically be inferred. Had the putative design of the executive committee surfaced earlier, it is not impossible that appellant could by force of moral suasion have prevented its fulfillment, but this too is a matter of sheer speculation. Nor can injured feelings attendant

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[54] *Holmes* v. *Keets*, 80 U.S.App.D.C. 327, 328-329, 153 F.2d 132, 133-134 (1946); see *Liechty* v. *Liechty*, 231 N.W.2d 729, 731 (N.D. 1975), quoting A Bromberg, J. Crane & A. Bromberg, Partnership § 5 at 43 (1968). The Uniform Partnership Act, in force in both Illinois and the District of Columbia, provides for the operation of statutory rules prescribing the rights and duties of partners *inter se* "subject to any agreement" between them. D.C. Code § 41-317 (1973); Ill. Rev. Stat. ch. 106-½ § 1 (1973). Several courts have assumed in dicta that this provision means that statutory requirements for the admission of partners may be overridden by an agreement providing otherwise, although no court seems to have specifically decided the question. See, *e.g.*, *Johnson* v. *Hill*, 1 Ariz. App. 290, 402 P.2d 225, 226 (1965), quoted in *Troupe* v. *Seby*, 416 F.2d 514, 519 (9th Cir. 1969); *Polikoff* v. *Levy*, 55 Ill. App. 2d 229, 204 N.E.2d 807, *cert. denied*, 382 U.S. 903, 86 S.Ct. 237, 15 L.Ed.2d 156 (1965); *Rapoport* v. *55 Perry Co.*, 50 App.Div. 2d 54, 376 N.Y.S.2d 147, 149 (1975). This construction is buttressed by holdings that an agreement in abrogation of the statutory provisions on dissolution of partnerships is valid under the Uniform Partnership Act, *Stuart* v. *Overland Medical Center*, 510 S.W.2d 494, 498-499 (Mo. App. 1974); *Gibson* v. *Angros*, 491 P.2d 87, 90-91 (Col. App. 1971); see *Johnson* v. *Hill*, *supra*.

[55] The agreement provided that admission of new partners could be effected only be assent of partners holding the majority of all voting percentages. Appellant held only a minority of those percentages, and all other underwriting partners voted to approve the merger, so even if his vote was vitiated by misrepresentation, an ample majority continued to exist.

upon the executive committee's appointment of co-chairmen for the Washington office committee and its disregard of appellant's views on relocation of the office be said to derive an actionable character from any concealment of purpose as charged by appellant. Those actions were, as we have seen, exertions of contractual prerogatives which could have been exercised with equal facility either way.[56]

Without a doubt, appellant felt gravely offended by what he deems wrongdoing by the executive committee, but a *sine qua non* of any recovery for misrepresentation is a showing of pecuniary loss proximately caused by reliance on the misrepresentation.[57] Save for appellant's inability to survive this requirement, he would be entitled to a trial on his misrepresentation count and, if proven circumstances warranted, to the jury's consideration of an award of punitive as well as compensatory damages.[58] But, as a leading commentator in the torts fields explains, "[s]ince the modern action of deceit [59] is a decendant of the older action on the case, it carries over the requirement that the plaintiff must have suffered substantial damage before the cause of action can arise. Nominal damages are

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[56] Since the breach of a fiduciary relationship is not actionable unless injury accrues to the beneficiary or the fiduciary profits thereby, see, *e.g.*, Restatement (Second) of Trusts § 205 (1959), and since neither injury to appellant nor profit to any appellee can be shown to flow from any nondisclosure complained of, appellant's allegation of breach of a fiduciary duty by nondisclosure must also fail. Thus we need not reach the question whether the partnership reposes such authority in the executive committee that it might be said to amount to a waiver of disclosure.

[57] See cases cited *supra* note 53.

[58] In the District of Columbia, proof of fraudulent misrepresentation is itself sufficient to support an award of punitive damages, because of the state of mind rendering it fraudulent. *Harris* v. *Wagshal*, 343 A.2d 283, 288 (D.C. Ct. App. 1975); *District Motor Co.* v. *Rodill*, 88 A.2d 489, 492-493 (D.C. Mun. App. 1952).

[59] See note 37 *supra* and accompanying text.

not awarded in deceit, and there can be no recovery if the plaintiff is none the worse off for the misrepresentation, however flagrant it may have been," [60] and that is precisely the situation here. We are mindful of the so-called federal rule, which obtains in the District of Columbia, that punitive damages are allowable even in the absence of compensatory damages,[61] but we think the rule is inapplicable here. Almost all of the decisions applying that principle have dealt either with trespass to the person or property [62]

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[60] W. Prosser, Torts § 110 at 731 (4th ed. 1971). See, *e.g.*, *Bruce Lincoln-Mercury, Inc.* v. *Universal C.I.T. Credit Corp.*, 325 F.2d 2, 22 (3d Cir. 1963) (Pennsylvania law); *Durham* v. *New Amsterdam Cas. Co.*, 209 F.2d 342, 345 (4th Cir. 1953) (Virginia law); *Ollier* v. *Lake Cent. Airlines, Inc.*, 423 F.2d 554, 556 (6th Cir. 1970) (Ohio law); *Geach* v. *Olsen*, 211 F.2d 682, 685 (7th Cir. 1958) (Illinois law); *Holliday* v. *Great Atlantic & Pacific Tea Co.*, 256 F.2d 297, 300 (8th Cir. 1958); *PSG Co.* v. *Merrill Lynch, Pierce, Fenner & Smith*, 417 F.2d 659, 663 (9th Cir.), *cert. denied*, 397 U.S. 918, 90 S.Ct. 924, 25 L.Ed.2d 99 (1960) (Oregon law); *Klingbiel* v. *Commercial Credit Corp.*, 439 F.2d 1303, 1309 (10th Cir. 1971) (Kansas law); *Fischer Constr. Co.* v. *Fireman's Fund Ins. Co.*, 420 F.2d 271, 277 (10th Cir. 1970) (Oklahoma law), holding that actual damages are always a predicate for punitive damages. But see *Kelite Prods. Co.* v. *Binzel*, 224 F.2d 131, 145 (5th Cir. 1955) (Alabama law allows punitive damages in action on the case without compensatory damages) (dicta).

[61] *Camalier & Buckley-Madison, Inc.* v. *Madison Hotel, Inc.*, 168 U.S.App.D.C. 149, 164 n.108, 513 F.2d 407, 422 n.108 (1975); *Davis* v. *Schuchat*, 166 U.S.App.D.C. 351, 358 n.7 (1975); *Rogers* v. *Loether*, 467 F.2d 1110, 1112 n.4, *aff'd*, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1972); *Wardnan-Justice Motors* v. *Petrie*, 59 U.S.App.D.C. 262, 39 F.2d 512 (1930); *Washington Post Co.* v. *O'Donnell*, 43 App.D.C. 215, 240, *cert. denied*, 238 U.S. 625, 35 S.Ct. 663, 59 L.Ed. 1495 (1915); *Harris* v. *Wagshal*, *supra* note 58, 343 A.2d at 288; *United Sec.* v. *Franklin*, 180 A.2d 505, 511 (D.C. Ct. App. 1962); *First Nat'l Realty Co.* v. *Weathers*, 154 A.2d 548 (D.C.Ct.App. 1959); *DeFoe* v. *Potomac Elec. Power Co.*, 123 A.2d 920 (D.C. Mun. App. 1956).

[62] *E.g.*, *Camalier & Buckley-Madison, Inc.* v. *Madison Hotel, Inc.*, *supra* note 61 (trespass); *American Home Life Ins. Co.* v. *Cerrone*,

or with libel or slander per se [63]—all of which were actionable at common law without specific proof of resulting damages.[64] To action on the case—the common law remedy for misrepresentation [65]—developed later in history, and from the beginning its emphasis was on compensation for injuries actually sustained rather than on redress of symbolic grievances.[66] In any event, since appellant has not

43 App.D.C. 508, 512 (1915) (trespass); *Basista* v. *Weir*, 340 F.2d 74, 87 (3d Cir. 1965) (assault and false imprisonment).

[63] *Davis* v. *Schuchat*, *supra* note 61; *Afro-American Publishing Co.* v. *Jaffe*, 125 U.S.App.D.C. 70, 83, 366 F.2d 649, 662 (D.C. Cir. 1966); *Washington Post Co.* v. *O'Donnell*, *supra* note 61, 43 App.D.C. at 240; *Reynolds* v. *Pegler*, 223 F.2d 429, 434 (2d Cir. 1955); *Press Publishing Co.* v. *Monroe*, 73 F. 196, 200-201 (2d Cir. 1896). Several other of the cases asserting the federal rule awarded damages under statutory provisions that could be read as supporting a claim for punitive damages as a redress of a "symbolic grievance." See, *e.g.*, *Rogers* v. *Loether*, *supra* note 61, 467 F.2d at 1112 (housing discrimination); *Basista* v. *Weir*, *supra* note 62 (false imprisonment by officer); see *Gill* v. *Manuel*, 488 F.2d 799 (9th Cir. 1973).

[64] C. McCormick, Damages § 22 (1935); W. Prosser, Torts § 7 at 29; see R. Heusten, Salmond on the Law of Torts 6 (16th ed. 1973), quoted *supra* note 52.

[65] F. Harper & F. James, Torts § 7.15 at 590 (1956); W. Prosser, Torts § 105 at 685 (4th ed. 1971); T. Plucknett, A Concise History of the Common Law at 640-641 (5th ed. 1956); *cf.* Note, Deceit and Negligent Misrepresentation in Maryland, 35 Md. L. Rev. 651 n.7 (1976).

[66] W. Prosser, Torts § 7 at 28 (4th ed. 1971); see C. McCormick, Damages § 83 at 293 (1935):

> It seems to be agreed without dissent that the allowance of exemplary damages does not widen the range of actionable wrongs. . . . Consequently, the first inquiry must be, Does the complaint state a cause of action if the allegations relied upon solely to support the claim for exemplary damages be disregarded? If it does not, it is insufficient, and the claim for exemplary damages collapses with the rest of the case.

Cf. Cassell & Co. Ltd. v. *Broome* [1972] A.C. 1027, 1076 (Lord Hailsham L.C., disapproving *Mafo* v. *Adams* [1970] 1 Q.B. 548,

contended that he is entitled to punitive damages without a concomitant recovery of compensatory damages,[67] we do not pursue the point further.[68]

We conclude, then, that no compensable harm to appellant from the conduct complained of has been indicated. It follows that as a matter of law the defendant partners could not be held on the misrepresentation count and that summary judgment thereon was proper.

The judgment appealed from is

Affirmed.

558; Lord Hailsham asserting that punitive damages will not lie for deceit, though they will lie for actions such as defamation, intimidation, false imprisonment, malicious prosecution, trespass to land, persons or goods, conspiracy, and (by statute) infringement of copyright. 12 Halsbury's Laws of England § 1189 (4th ed. 1975).

[67] The District of Columbia Court of Appeals has suggested in dicta that in suits for misrepresentation damages may be awarded even absent compensatory damages. *Harris* v. *Wagshal*, *supra*, note 58, 343 A.2d at 288 n.13; *United Sec. Corp.* v. *Franklin*, *supra* note 61, 180 A.2d at 511. This is by far the minority view. See cases cited *supra* note 60. *Cf. Klein* v. *Spear, Leeds & Kellogg*, 306 F.Supp. 743 (S.D.N.Y. 1969), asserting that the majority rule is not that compensatory damages must actually be awarded, but that compensable injury must be shown, in order to qualify for an award of punitive damages. See C. McCormick, Damages § 83 at 293-294. *Harris* v. *Wagshal*, *supra* note 58, and *United Sec. Corp.* v. *Franklin*, *supra* note 61, both may be seen to fall within this construction of the rule. The District of Columbia court has yet to apply its suggestion, and it has also declared that punitive damages are not favored. *Riggs Nat'l Bank* v. *Price*, 359 A.2d 25, 28 (D.C. App. 1976), citing *Brown* v. *Coates*, 102 U.S.App.D.C. 300, 253 F.2d 36 (1958). We are, therefore, reluctant to make so drastic a departure from prior law without more explicit guidance.

[68] *United States* v. *Edmonds*, 173 U.S.App.D.C. 241, 243 n.11, 524 F.2d 62, 64 n.11 (1975); *Democratic Cent. Com.* v. *Washington Metropolitan Area Transit Comm'n*, 158 U.S. App.D.C. 7, 11 n.16, 485 F.2d 786, 790 n.16, *cert. denied*, 415 U.S. 935, 94 S.Ct. 1451, 39 L.Ed.2d 493 (1973); and cases cited therein. Fed. R. App. P. 20, 28(a)(4).

APPENDIX B

J. EDWARD DAY, *Plaintiff*,

v.

SIDLEY & AUSTIN ET AL., *Defendants*.

Civ. A. No. 74-1112.

United States District Court,
District of Columbia.

May 29, 1975.

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Memorandum Opinion

PARKER, *District Judge*.

This case involves a dispute between a former senior partner of Sidley & Austin (S&A), a Chicago law firm, and some of his fellow partners. The controversy centers around the merger between that firm and another Chicago firm, Liebman, Williams, Bennett, Baird and Minow (Liebman firm), and the events subsequent to the merger which ultimately led to plaintiff's resignation. Plaintiff seeks damages claiming a substantial loss of income, damage to his professional reputation and personal embarrassment which resulted from his forced resignation.

The matter is now before the Court on defendants' motion for summary judgment. After consideration of the pre- and post-hearing memoranda of counsel, answers to interrogatories, affidavits, and oral arguments, this Court concludes that defendants' motion for summary judgment should be granted.

On July 1, 1974, plaintiff J. Edward Day filed a complaint in the Superior Court for the District of Columbia against Sidley & Austin itself, and 12 named partners (members

of the firm's executive committee) alleging breach of fiduciary duty, breach of contract, fraud and misrepresentation, conspiracy, wrongful dissolution or ouster of co-partner and breach of partnership agreement. Thereafter, the individual defendants who had then been served filed a petition for removal in the United States District Court for the District of Columbia.[1] Federal jurisdiction is conferred by reason of diversity of citizenship and the amount in controversy exceeding $10,000. 28 U.S.C. § 1332. On October 8, 1974, this Court denied plaintiff's request for a remand to the Superior Court and quashed service on those individual defendants who had been served with Superior Court process after removal had become effective. Service against the partnership itself was quashed.[2] As of this date, plaintiff has served eleven of the individual defendants.

As an initial response to the motion for summary judgment plaintiff asserts that the motion should be denied because it is premature since "extensive discovery" is contemplated including depositions to supplement the interrogatories that have already been answered. In Washington v. Cameron, 133 U.S.App.D.C. 391, 411 F.2d 705 (1969), the district court was reversed for precipitously granting defendant's summary judgment motion on the basis of an *ex parte* administrative determination of fact, before plaintiff had had a chance to conduct any discovery. The caution and restraint dictated by *Cameron* was clearly warranted by its facts, the record and the state of the pleadings. Such an approach is not mandated by the record in this proceed-

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[1] Pursuant to 28 U.S.C. § 1441.

[2] The common law rule in the District of Columbia is that a partnership cannot sue or be sued as a separate entity. *See:* Mayflower Hotel Stockholders v. Mayflower Hotel Corp., 73 F.Supp. 721 (D.D.C. 1947), rev'd on other grounds, 84 U.S.App.D.C. 275, 173 F.2d 416 (1949); Fennell v. Bache, 74 App.D.C. 247, 123 F.2d 905 (1941); Matson v. Mackubin, 61 App.D.C. 102, 57 F.2d 941 (1932); National Ass'n for Community Development v. Hodgson, 356 F.Supp. 1339, 1402 (D.D.C.1973).

ing. Here, the plaintiff has conducted discovery by way of interrogatories, has filed several personal affidavits, and defendants have submitted key documents such as the Partnership Agreements of Sidley & Austin and the Memorandum of Understanding governing the proposed merger of S&A and the Liebman firm. The partnership agreements and other essential undisputed facts and relevant documents present questions of law and the Court sees no reason why the motion for summary judgment is untimely. *See* E. P. Hinkel & Co. v. Manhattan Co., 506 F.2d 201 (D.C. Cir. 1974).

The Factual Background

The basic and material facts in this controversy may be briefly detailed.

Mr. Day was first associated with Sidley & Austin in 1938. His legal career was interrupted by World War II service in the Navy and by his tenure with both the Illinois state government and as Postmaster General of the United States. Upon leaving the federal government, he was instrumental in establishing a Washington office for the firm in 1963. As a senior underwriting partner, he was entitled to a certain percentage of the firm's profits, and was also privileged to vote on certain matters which were specified in the partnership agreement. He was never a member of the executive committee, however, which managed the firm's day-to-day business. He remained an underwriting partner with Sidley & Austin from 1963 until his resignation in December 1972.

At some time between February 1972 and July 12, 1972, S&A's executive committtee explored the idea of a possible merger between that firm and the Liebman firm. S&A partners who were not on the executive committee were unaware of the proposal until it was revealed at a special meeting of its underwriting partners on July 17, 1972. At that meeting, each partner present, including plaintiff, voiced approval of

the merger idea and favored pursuing further that possibility in such manner as the executive committee of S&A might think proper or advisable, with the understanding that any proposed agreement would first be submitted to all partners for their consideration before any binding commitments were made. The merger was further discussed at meetings of the underwriting partners held on September 6, September 22, September 26 and September 28. The plaintiff received timely notice of the meetings but did not attend.

The final Memorandum of Understanding dated September 29, 1972 and the final amended Partnership Agreement, dated October 16, 1972 were executed by all S&A partners, including plaintiff. The Memorandum incorporated a minor change requested by plaintiff.

At a meeting of the executive committee of the combined firm on October 16, 1972, it was decided that the Washington offices and the Washington office committees of the two predecessor firms would be consolidated. The former chairmen of the Washington office committees of the two firms were appointed co-chairmen of the new Washington Office Committee.[3]

In late October of 1972, the new Washington Office Committee recommended to the Management Committee that a combined Washington Office be set up at 1730 Pennsylvania Avenue, thus eliminating the old S&A Washington office

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[3] Day was not a member of the executive committee of the merged firm. He had been the chairman of the S&A Washington Office and John Robson had been chairman of the equivalent Liebman office before the merger. Day contends that the decision to have co-chairmen had been made well before the October 16 executive committee meeting and indeed, the alleged concealment of this fact forms the basis for plaintiff's claim that the approval of the merger was fraudulently induced. There is no dispute, however, that the matter was finalized and made known to plaintiff as of October 16th.

in the Cafritz Building. A decision was then made to move to the new location despite plaintiff's objections.

Mr. Day resigned from Sidley & Austin effective December 31, 1972 claiming that the changes which occurred after the merger in the Washington Office—the appointment of co-chairmen and the relocation of the office—made continued service with the firm intolerable for him.

Plaintiff has made certain allegations which are not conceded by defendants. As to these matters, plaintiff's allegations have been given the benefit of all reasonable doubts and inferences.[4]

Mr. Day contends that he had a contractual right to remain the sole chairman of the Washington Office, and that the maintenance of this status was a condition precedent for his rejoining the firm in 1963 and opening the Washington office. According the plaintiff, the decision to appoint co-chairmen was made prior to the merger and defendants' concealment of that decision was a material omission and without that prior information his vote of approval for the merger would not have been given.

He further alleges that certain active misrepresentations about the results of the proposal also had the effect of voiding the approval of the merger. These other alleged misrepresentations were:

(1) that no Sidley partner would be worse off in any way as a result of the merger, including positions on committees;

[4] 10 Wright & Miller, Federal Practice and Procedure § 2725, at 510 (1973). *See:* Day v. United Automobile Aerospace and Agricultural Implement Workers of America, Local 36 of UAW, 466 F.2d 83 (6th Cir. 1972); Gross v. Southern Railway Co., 414 F.2d 292 (5th Cir. 1969); Cox v. American Fidelity & Casualty Co., 249 F.2d 616 (9th Cir. 1957).

(2) that two senior partners of the Liebman firm would soon be leaving law practice;

(3) that the merged firm would drop representation of a certain Liebman client whose interests might conflict with some Sidley clients;

(4) that the merger with Liebman would be advantageous to the Sidley partners and would add to the standing and prestige of the firms;

(5) that all aspects of the merger had been exhaustively investigated by defendants; and

(6) that there were good, sound, objective reasons which made the merger highly desirable.

Plaintiff also alleges that the fact that the Liebman firm had been shopping around for a merger partner for 10 years was concealed.

Events after the merger, allegedly void because of the mentioned omissions and misrepresentations, inevitably led to plaintiff's resignation. The loss of his status as sole chairman of the Washington office was viewed by plaintiff as a humiliating experience, especially as it was accompanied by harrassment by the defendants. Day points to the method of handling the relocation of the consolidated firm as the most obvious manifestation of the defendants' intent to force his resignation. In an affidavit submitted by plaintiff, he asserts that the process of approving the office move entailed a series of meetings held and decisions made without consulting him, all in derogation of his former status as the final decision maker for the S&A Washington office.

Defendants do not concede that misrepresentations or omissions tainted the approval of the merger, nor do they admit engaging in harrassment techniques intended to force plaintiff to resign. The thrust of defendants' argument for summary judgment is that plaintiff's factual al-

legations are not material because they fail to state a cause of action. Defendants contend that any possible taint of plaintiff's vote in favor of the merger is of no consequence because only a majority, and not unanimous consent, was required for the merger under the provisions of the partnership agreements. Defendants also contend that any diminution of status as perceived by plaintiff cannot have any legal consequences because he had no vested contractual right to remain the sole chairman. They rely on the terms of the partnership agreements to support this defense. Under the agreements, the Executive Committee had the authority to govern the composition of all other firm committees and no special provisions had been made as to plaintiff's vested right in the Washington office.

An analysis of the adequacy of each of plaintiff's causes of action follows.

FRAUD

Plaintiff contends that the pre-merger representations, set forth above, were fraudulent, that the approval based on such misrepresentations was wrongfully obtained and illegal and that he was forced to resign because of the intolerable conditions which flowed from the illegal merger. The Court has reviewed the misrepresentation claims and concludes that they fall short of supporting any cause of action for fraud.

The essential elements of fraud are: (1) a deliberate misstatement of fact, (2) made with the intent to deceive another person, (3) reasonably relied upon by the deceived person, (4) which reliance proximately and directly results in damage to that person.[5]

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[5] *See:* Isen v. Calvert Corp., 126 U.S.App.D.C. 349, 379 F.2d 126 (1967); United States v. Kiefer, 97 U.S.App.D.C. 101, 228 F.2d 448 (1955), cert. denied, 350 U.S. 933, 76 S.Ct. 305, 100 L.Ed. 815 (1956); Hooker v. Midland Steel Co., 215 Ill. 444, 74 N.E. 445 (1905); Crocker v. Manley, 164 Ill. 282, 45 N.E. 577 (1896). *See also* 12 Williston Contracts § 1487 (3d ed. 1970).

As to the statements regarding the future plans of two Liebman partners, and the dropping of a Liebman client, plaintiff's damages could not have been caused by his reliance on these statements because he left the firm only a few months after the merger, without having sufficient time to ascertain whether the promised events would occur. Also, as a general rule, a misrepresentation as to future events will not constitute fraud unless the person making the statement has definite knowledge that those events will not occur.[6] It is also quite apparent from plaintiff's affidavit that the other representations about the Liebman firm were not a factor in plaintiff's resignation, because the main reason for his departure was his perceived loss of stature within the firm. These representations are therefore immaterial.

The key misrepresentation which forms the basis of plaintiff's complaint is that no Sidley partner would be worse off as a result of the merger. Plaintiff interpreted this to mean that he would continue to serve as the sole chairman of the Washington Office and that he would wield the commanding authority regarding such matters as expanding office space. It was the change in plaintiff's status at the Washington Office which directly precipitated his resignation.

This misrepresentation regarding plaintiff's status cannot support a cause of action for fraud, however, because plaintiff was not deprived of any *legal* right as a result of his reliance on this statement. The 1970 S&A Partnership

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[6] *See:* Hayes v. Disque, 401 Ill. 479, 82 N.E.2d 350 (1948); Brodsky v. Frank, 342 Ill. 110, 173 N.E. 775 (1930); Miller v. Sutliff, 241 Ill. 521, 89 N.E. 651 (1909); Parker v. Arthur Murray, Inc., 10 Ill.App.3d 1000, 295 N.E.2d 487, 490 (1973).

Agreement,[7] to which plaintiff was a party, sets forth in some detail the relationships among the partners and the structure of the firm. No mention is made of the Washington Office or plaintiff's status therein, whereas special arrangements are specified for certain other partners. If chairmanship of the Washington Office was of the importance now claimed, the absence of such a provision from the partnership agreement requires a measured explanation which Mr. Day does not supply. Plaintiff's allegations of an unwritten understanding cannot now be heard to contravene the provisions of the Partnership Agreement which seemingly embodied the complete intentions of the parties as to the manner in which the firm was to be operated and managed.

Nor can plaintiff have reasonably believed that no changes would be made in the Washington Office since the S&A Agreement gave complete authority to the executive committee to decide questions of firm policy,[8] which would

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[7] The Sidley & Austin Partnership Agreement dated April 24, 1970 was the governing contract in effect at the time the merger was negotiated and approved, and the validity of the merger procedure should be evaluated in light of this agreement. An amended agreement which took into account the needs of the larger merged firm, was executed on October 16, 1972, in conjunction with a Memorandum of Understanding detailing the terms of the merger.

[8] Both the 1970 and 1972 S&A Partnership Agreements contained the following language:

1. All questions of Firm policy, including determinations of salaries, expense, Partners' participation, required balances of Partners, investment of funds, designation of Counsel, and the admission and severance of Partners, shall be decided by an Executive Committee) then holding a majority of all voting Percentages. The Committee . . . provided, however, that the determination of participation, admission and severance of Partners, shall require the approval of Partners (whether or not members of the Executive Committee shall advise and consult with other Partners to such an extent as the Committee may deem advisable and in the best interest of the Firm.

Any amendment to this Agreement or any subsequent agreement,

clearly include establishment of committees and the appointment of members and chairpersons. Having read and signed the 1970 and 1972 S&A Partnership Agreements which implicitly authorized the Executive Committee to create, control or eliminate firm committees, plaintiff could not have reasonably believed that the status of the Washington Office Committee was inviolate and beyond the scope and operation of the Partnership Agreements. Thus, since plaintiff had no right to remain chairman of the Washington Office, a misrepresentation regarding his chairmanship does not form the basis for a cause of action in fraud.

Breach of Contract, Conspiracy and Wrongful Dissolution or Ouster of Partner

As shown above, plaintiff had no contractual right to maintain his authority over the Washington Office, and therefore he has not made out a case for breach of contract. Since he did not have a legal right to maintain his status in the firm, the conspiracy charge [9] amounts to no more than an internal power sweep, executed and permitted under the provisions of the partnership agreement for which there is no legal remedy.

Similarly, there was no wrongful dissolution or ouster of plaintiff from the partnership because the merger of the two firms was authorized under the terms of the S&A partnership agreement. By the terms of the agreement, the

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if signed or initialed by partners then holding a majority of all voting Percentages, shall be as effective as though signed or initialed by all Partners; provided, however, that any agreement providing for the incorporation of the Firm shall be signed by Partners then holding seventy-five percent (75%) of all voting Percentages. . . .

[9] Plaintiff charged in his original complaint that defendants had conspired to change the basic nature of the firm by presenting a far-advanced merger arrangement and to downgrade plaintiff's status at the Washington Office, thus forcing plaintiff to resign. See plaintiff's complaint Count IV, ¶¶ 47-53.

executive committee was entrusted with "all questions of Firm policy." [10] Additionally, partners could be admitted and severed from the firm and the partnership agreement could be amended by majority approval by the partners.[11] The merger of S&A with the Liebman firm could be considered either as the admission of new partners or the making of a new or amended agreement, and thus majority approval was all that was required, and a post factor change in plaintiff's vote would be of no effect.

Plaintiff contends that the merger was such a fundamental change in the nature of the partnership that unanimous approval was required and that had he known the personal consequences of the merger, he would have exercised a "veto" and the events which forced him to resign would not have occurred. This theory, however, runs counter to the prevailing law of partnership. Generally, common law and statutory standards concerning relationships between partners can be overridden by an agreement reached by the parties themselves.[12] The Uniform Partnership Act (adopted both in Illinois and the District of Columbia) [13] specifically provides that statutory rules governing the rights and duties of the partners are "subject to any agreement between them." [14]

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[10] *See* note 8, *supra*. Management by an executive committee elected by a majority of the partners is a legally acceptable contractual arrangement. *See:* Morrison v. Ultican, 35 Wash.2d 504, 213 P.2d 617 (1950); Bernstein, Wile & Gordon v. Ross, 22 Mich. App. 117, 177 N.W.2d 193 (1970).

[11] *See* note 8, *supra*.

[12] *See* H. Crane and A. Bromberg, Law of Partnership § 5, at 43 (1968).

[13] *See* Am. Jur.2d Desk Book, Doc. 129 (1974 Supp.).

[14] *See* D.C.Code § 41-317 (1973) and Ill.Rev.Stat.1973, ch. 106½, § 18. Two of the rules which are thus "subject of agreement" are:

(e) All partners have equal rights in the management and conduct of the partnership business.

* * * * *

(g) No person can become a member of a partnership without the consent of all the partners. *Id.*

See also Holman v. Coie, 11 Wash.App. 195, 522 P.2d 515 (1974), where a court upheld the expulsion of two partners by majority vote without any form of notice or hearing on the ground that the partnership agreement expressly provided for such summary procedure.

Nor do the cases cited by plaintiff support the proposition that unanimous consent is needed for the merger of partnerships. In McCallum v. Asbury, 238 Or. 257, 393 P.2d 774 (1964), a partner sued to dissolve a partnership of medical doctors. Plaintiff challenged the amendment of the agreement by majority vote which provided for management by an executive committee. The court held that a majority could approve this change, even though the agreement provided that all partners were to have an equal share in management. Likewise, Fortugno v. Hudson Manure Co., 51 N.J. Super. 482, 144 A.2d 207 (1958), affords little support.

Fortugno basically held that a partner could not be effectively changed into a stockholder in a corporation without his consent. In that case, there had been no prior contract that the partnership agreement could be amended by majority vote. The S&A Agreement however, dealt specifically with incorporation of the firm,, providing that incorporation would be effective if approved by three-fourths of the partners. Merger was a less dramatic change than incorporation, which would have eliminated the partnership entity. It cannot reasonably be argued, therefore, that the merger fell outside the purview of the Agreement, requiring unanimous consent for its approval. Amendments to the Agreement and admission of partners required only majority approval, and plaintiff's proposed "veto power" is nothing more than an expressed hope, incompatible with

and contrary to the overall scheme and provisions of the S&A Agreement.

Breach of Fiduciary Duty

Plaintiff also alleges that defendants breached their fiduciary duty by beginning negotiations on a merger with the Liebman firm without consulting the other partners who were not on the Executive Committee and by not revealing information regarding changes that would occur as a result of the merger, such as the co-chairman arrangement for the Washington office. An examination of the case law on a partner's fiduciary duties, however, reveals that courts have been primarily concerned with partners who make secret profits at the expense of the partnership.[15] Partners have a duty to make a full and fair disclosure to other partners of all information which may be of value to the partnership. 1 Rowley on Partnership § 20.2, at 512-13 (2d ed. 1960). The essence of a breach of fiduciary duty between partners is that one partner has advantaged himself at the expense of the firm. *Id.* The basic fiduciary duties are: 1) a partner must account for any profit acquired in a manner injurious to the interests of the partnership, such as commissions or purchases on the sale of partnership property; 2) a partner cannot without the consent of the other partners, acquire for himself a partnership, asset, nor may he divert to his own use a partnership opportunity; and 3) he must not compete with the partnership within the scope of the business. *See* Crane & Bromberg, Law of Partnership § 68, at 389-91 (1968).

A typical case of breach of fiduciary duty and fraud between partners cited by plaintiff is Bakalis v. Bressler, 1 Ill.2d 72, 115 N.E.2d 323 (1953). There, a defendant partner had surreptitiously purchased the building which housed the partnership's business and was collecting rents

[15] *See:* J. Crane & A. Bromberg, Law of Partnership § 68 (1968); 1 Rowley on Partnership §§ 20.0-20.2 and § 21.1 (2d ed. 1960).

from the partnership for his own profit. What plaintiff is alleging in the instant case, however, concerns failure to reveal information regarding changes in the internal structure of the firm. No court has recognized a fiduciary duty to disclose this type of information, the concealment of which does not produce any profit for the offending partners nor any financial loss for the partnership as a whole. Not only was there no financial gain for defendants, but the remaining partners did not acquire any more power within the firm as the result of the alleged withholding of information from plaintiff. They were already members of the executive committee and as such had wide-ranging authority with regard to firm management. Thus plaintiff's claim of breach of fiduciary duty must fail.

What this Court perceives from Mr. Day's pleadings and affidavits is that he may be suffering from a bruised ego but that the facts fail to establish a legal cause of action. As an able and experienced attorney, it should have been clear that the differences and misunderstandings which developed with his former partners were business risks of the sort which cannot be resolved by judicial proceedings. Mr. Day, a knowledgeable, sophisticated and experienced businessman and a responsible member of a large law firm, bound himself to a well-defined contractual arrangement when he executed the 1970 [16] Partnership Agreement. The contract clearly provided for management authority in the executive committee and for majority approval of the merger with the Liebman firm. Even if plaintiff had voted against the merger, he could not have stopped it. Furthermore, the Partnership Agreement, to which he freely consented denies the existence of a contractual right to any particular status within the firm for plaintiff. If plaintiff's partners did indeed combine against him, it is clear that their alleged activities did not amount to illegality, and that any personal humiliation or injury was

[16] *See* note 7, *supra*.

a risk that he assumed when he joined with others in the partnership.

Accordingly it is this 29th day of May, 1975

Ordered that defendants' motion for summary judgment is granted and the complaint in this proceeding is dismissed with prejudice.

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